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Supreme Court, U. S.
FILED
1974

No. 73-1019

In the
Supreme Court of the United States

to

CHARLES LESLIE DENNIS,

Petitioner,

vs.

J. M. WOOD, JR., P. E. BOWERS, and A. ROBERT LOWRY,

Respondents.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents pray that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on November 2, 1973 shall not issue.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I

THIS COURT HAS PREVIOUSLY DENIED CERTIORARI THREE TIMES ON THE IDENTICAL QUESTION PRESENTED.

The question here presented — whether Section 609 (29 U.S.C. §529) of the LMRDA protects union officers

from discipline, including suspension from office, imposed for exercising free speech rights guaranteed by Sections 101(a)(1) and 101(a)(2) (29 U.S.C. 401 et seq.) of the Act — has been directly presented to this Court at least three times after the decision in *Sheridan* v. *United Brotherhood*, 306 F.2d 152 (3rd Cir. 1962).

In the case of *Grand Lodge* v. *King*, 335 F. 2d 340 (9th Cir. 1964) the United States Court of Appeals for the Ninth Circuit concluded that the free speech provisions of the LMRDA apply to officer-members of unions *qua* officers. *King, supra*, at p. 344. This Court denied the Union's Petition for a Writ of Certiorari at 370 U.S. 920.

In *Sewell* v. *Machinists*, 445 F. 2d 545, 550 (5th Cir. 1971), cert. den. 404 U.S. 1024 the Court, citing King, *supra*, said:

> "We fully concur in [plaintiff's] contention that each member of a labor union is guaranteed the right of free expression as well as the right to participate freely in the union's democratic processes. Disciplinary action for the exercise of such rights offends the terms of the [LMRDA]. Moreover, the rights of free expression and assembly as well as other rights protected by the statute may be exercised fully and freely by any member of the Union; the mere fact that a member is an appointed or elected official of the Union does not destroy his statutory rights."

Finally, in the case of *Martire* v. *Laborers' Local Union 1058*, 410 F. 2d 32 (3rd Cir. 1969) cert. den. 396 U.S. 903, the Third Circuit, which alone holds a view contrary to the Ninth, Seventh, Second, Fifth and District of Columbia Circuits,[1] stated it adhered to the ruling of

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[1] *Grand Lodge* v. *King*, 335 F.2d 340 (9 Cir. 1964) cert. den. 370 U.S. 920; *Wood et al.* v. *Dennis*, ... F.2d ..... (7 Cir. 1973) (A4-A20); *Schonfeld* v. *Penza*, 477

Sheridan v. *United Brotherhood of Carpenters*, 306 F. 2d 152 (3rd Cir. 1962), and held there was no remedy for removal from union office under 101(a)(5) of the Act. The opinion in *Martire* was also written by Judge Kalodner. This Court denied the Petition for Writ of Certiorari at 396 U.S. 903.

Thus, although the Third Circuit holds a view different from the other courts of appeals, the United States Supreme Court has not considered a review of this matter on writ of certiorari to be sufficiently "special and important." It is submitted that nothing has occurred which would render this issue more appropriate for review since the denials of certiorari in *King, Sewell* and *Martire, supra.* Moreover, the reasons for not granting the Petition at this time outweigh other considerations.

II

GRANTING THE PETITION BEFORE THE CASE IS HEARD ON THE MERITS WILL COMPOUND THE HARM SUFFERED BY RESPONDENT LOWRY.

Although the United States Court of Appeals for the Seventh Circuit has decided that Respondent Lowry has indeed stated a cause of action for illegal removal from his office of President of the T-C Division of BRAC, two years and seven months after that removal, Lowry is still out of office.

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[1] (Continued)
F. 2d 899 (2nd Cir. 1973); *Gleason* v. *Chain Service Rest. Workers*, 422 F. 2d 342 (2nd Cir. 1970); *Sewell* v. *Machinists*, 445 F.2d 545 (5 Cir. 1971) cert. den. 404 U.S. 1024; *Cefalo* v. *Dist. 50 U.M.W.*, 73 LRRM 2967, 311 F. Supp. 946 (D.D.C. 1970); *Yablonski* v. *United Mine Workers*, 466 F.2d 424 (D.C. Cir. 1972)

As indicated above, the Court of Appeals issued its Mandate to the District Court on January 15, 1974. On January 25, 1974 the case was assigned to Judge Richard B. Austin of the Northern District of Illinois, where Respondent is awaiting Petitioner's answer to the verified complaint on or before February 24, 1974. If certiorari is granted before a decision on the merits is rendered, Lowry will face further long delays without having been afforded the opportunity to prove the allegations of his complaint.

III

THIS COURT HAS INFERENTIALLY ACCEPTED THE VIEW OF THE SEVENTH, NINTH, AND DISTRICT OF COLUMBIA CIRCUITS AND REJECTED THE HOLDING OF JUDGE KALODNER IN SHERIDAN.

The Supreme Court has recently held, inferentially, that a union officer alleging removal for asserting free speech rights *states a valid cause of action.* In *Hall* v. *Cole,* 412 U.S. 1 (1973), this Court considered the propriety of an award of counsel fees to a successful plaintiff in a suit brought under §102 of the Labor-Management Reporting and Disclosure Act of 1959. (29 U.S.C. §412). In holding that the allowance of counsel fees in such cases is consistent with both the Act and the historic equitable power of federal courts, the Supreme Court relied heavily on *Yablonski* v. *United Mine Workers,* 466 F. 2d 424 (D.C. Cir. 1972), citing the case no fewer than four times.

One of the lawsuits for which this Court allowed attorneys' fees is factually identical to the instant case. The United States Court of Appeals for the District of Columbia Circuit described the action as follows:

> "With the announcement of his candidacy, Mr. Yablonski was promptly removed, without notice and

> without any serious attempt at justification, from his job as Acting Director of Labor's Non-Partisan League in Washington and reassigned to District 5 in Pittsburgh which was controlled by his opponent, Mr. Boyle, the UMW presidential incumbent. Section 609 of LMRDA makes it unlawful for any labor organization 'to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled' under the Act. 29 U.S.C. §529. Mr. Yablonski again filed suit, with the result that the District Court, after hearing, found as a fact that the removal had been motivated by a purpose to retaliate for his candidacy. A preliminary injunction was granted, ordering his reinstatement." *Yablonski, supra,* p. 426

Mr. Lowry's lawsuit is substantially identical to that of Mr. Yablonski. In approving an award of attorneys' fees to a successful plaintiff whose cause of action alleged removal from union office for exercising free speech rights guaranteed under the LMRDA, this Court has inferentially, but significantly, ratified the view of the Ninth Circuit, as expressed in *King, supra,* and that of the Seventh Circuit, as expressed below.

In view of the foregoing, it would appear that a denial of the Petition here is in order.

IV

THE ALLEGED CONFLICT BETWEEN COURTS OF APPEALS IS ILLUSORY.

The singularly contrary view of the Third Circuit that a union officer is not protected from summary removal from office for asserting the free speech rights of Title I of the LMRDA springs from the opinion of Judge Kalodner in the case of *Sheridan* v. *United Brotherhood of Carpenters,* 306 F. 2d 152 (3rd Cir. 1962).

Why does the LMRDA not encompass removal from office if that removal is a device to choke off the free speech guaranteed under §101(a)(2) of the Act? The court in *King* thought it did and it had the *Sheridan* opinion before it when its own decision was made, noting that *Sheridan* really dealt with the power of the membership to turn out its own officers which was guaranteed in absolute terms by §401 of the Act. *Grand Lodge* v. *King,* 335 F. 2d, at p. 346, n.21.

In their opinion in *Grand Lodge* v. *King, supra,* the Ninth Circuit concluded that sections 101(a)(2) and 101(a)(2) apply to officer-members such as Respondent and found that "there are no decisions to the contrary," with the exception of Judge Kalodner's opinion in *Sheridan.* The Ninth Circuit pointed out that the opinion was not joined in by Judge Hastie, who concurred in the result upon a different ground, or by Judge McLaughlin, who dissented. *King, supra,* p. 347 n.31. The court also noted that Judge Kalodner relied heavily on the fact that in *Sheridan,* the plaintiff business agent, was removed from office by a vote of the union membership, and that the right of union members to remove their officers is itself essential to democratic self-government. The *King* court stated, however, that the power of the member-electorate to turn out elected officials for serious misconduct is guaranteed by §401(h) of the Act, and is not at issue here.

> "And, as we have said, there is nothing to indicate that Congress believed effective union democracy required that controlling union officials have power to discharge other officers for exercising union freedom of speech and assembly in internal union political affairs." *Grand Lodge* v. *King,* 335 F. 2d, at p. 346, n.21.

That is how Judge Kalodner, in *Sheridan,* became misled. He confused the right of a union *membership* to oust

corrupt officers with a completely different situation when an all-powerful union officer removes another officer because of political differences. The latter set of facts, representative of both *King* and the present case, is a violation of §609 of the LMRDA.

The Court below likewise had Judge Kalodner's *Sheridan* opinion before it when it decided, *en banc*, that Lowry stated a cause of action for illegal removal. Here is how the United States Court of Appeals for the Seventh Circuit viewed *Sheridan*.

> "Defendant also relies on *Sheridan* v. *United Brotherhood of Carpenters & Joiners of America*, Local No. 626, 306 F. 2d 152 (3d Cir. 1962) which case the *King* court considered. As that court noted, 335 F. 2d at 347 n. 31, Judge Kalodner's opinion in *Sheridan* was not joined in by the other two members of the panel. Judge Hastie concurred in the result upon a different ground and Judge McLaughlin dissented. *Sheridan*, therefore, represents the views of a single judge of the Third Circuit. (A 9-10)
>
> It is true the Third Circuit in *Martire* v. *Laborers' Local Union 1058*, 410 F. 2d 32 (3d Cir. 1969), cert. denied, 396 U.S. 903, stated that it adhered to the ruling of *Sheridan*; however, the opinion was written by Judge Kalodner and did find a limited nexus between the Act-guaranteed rights of membership and the holding of union office. The decision would accord the right to utilize the remedies of the Act to assert the right to hold office in the future but would find the right nonexistent where the member was removed from office. Finally, it is noted that insofar as the latter matter is concerned, the court's holding was that the plaintiff did not have a remedy under §101(a)(5) by reason of his removal from office. As has already been indicated herein, there is no disagreement on that issue among the courts. But what is equally significant is that *Sheridan*

> relies, in no small part, on the fact that the "overriding purpose of the Labor-Management Reporting and Disclosure Act was to insure to members of unions the right to self-government and union democracy." 306 F. 2d at 158. Thus, Judge Kalodner emphasized that the business agent had been removed from office by vote of the membership of the union. In the present case, however, we have the elected representative of the T-C Division being stripped of his office by the President of BRAC, his nominal superior. At least on such facts we find no compulsion to read the words "or otherwise discipline" in §609 to exclude removal from office. See Etelson and Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 Harv. L. Rev. 727, 737-38 (1969). (A 10)

To say that because of one Judge's contrary view, there exists a meaningful conflict among the various courts of appeals is to extend the purposes of the certiorari procedures beyond reasonable limits at the expense of the respondent.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny the petition for the issuance of its writ of certiorari to review the decision below.

Respectfully submitted,

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